No. **12818**

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SETH J. A. WELDON and DOROTHY WELDON,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' REPLY BRIEF

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Jurisdictional Statement

Appellee's suggestion that Seth J. A. Weldon has no right of appeal is hardly a contention to that effect.

Said appellant relies on the following cases:

U.S. vs. *Poller*, 43 F. 2d 919,

Perlman vs. *U.S.*, 247 U.S. 7; 38 S.Ct. 417,

Burdeau vs. *McDowell*, 256 U.S. 465

In re Milburne, 77 F. 2d 310,

In re Sana Laboratories, 115 F. 2d 717,

Cogen vs. *U.S.*, 278 U.S. 221, 225; 49 S.Ct. 118,

Go-Bart Importing Co. vs. *U.S.*, 282 U.S. 344, 356; 51 S.Ct. 153,

to sustain his right to prosecute this appeal.

Further Statement of Facts

It should be pointed out, in amplification of the statement of facts made by appellants herein, that the following-described property mentioned in the motions filed herein,

> The sum of $28.51, and the
> Bill of sale of furniture,

has been returned to petitioners and is not the subject of the present appeal. (R. 59)

Said appeal has to do with the motion to return and to suppress:

> $900.00, and
> One cigarette case,
> the property of Dorothy Weldon,
> Bill of Sale for Crosley automobile,
> in the possession of Dorothy Weldon,
> Index card,
> the property of appellant, Seth J. A. Weldon.

Argument

I

OWNERSHIP OF THE PROPERTY

There is little conflict in the evidence presented by the affidavits on which the motions were tried by the trial court. There was no direct contradiction of the proof that the $900.00 in question was the property of Dorothy Weldon; and the only conflict in the evidence pointed out by appellee having anything to do

with money belonging to Dorothy Weldon is based on minor circumstances—one as to a $50.00 bill, and another as to the alleged failure of Mrs. Weldon to explain, at the time of her arrest, the source of the $900.00 or to claim it as her property. As a matter of fact Mrs. Weldon not only made lengthy explanation as to the source of her money in her affidavit filed in support of her motion (R. 10); but she also explained to the officers at the time of the arrest that the money belonged to her and had come to her from Mr. Sussman. (R. 42).

The alleged statement of Mrs. Weldon to Agent Haack that when she married she did not have any money and did not even have proper clothes is explained and denied by Mrs. Weldon. (R. 41)

It therefore stands without substantial conflict that Mrs. Weldon was the owner of the sum of $900.00, and there is no doubt of her ownership of the cigarette case. It is established without conflict in the evidence that she was in the lawful possession of the bill of sale for the Crosley automobile; and it also appears without conflict that Mr. Weldon is the owner of the index card.

Ownership of the property is not important in cases of this kind. It is enough that petitioners were entitled to its possession.

It is a false issue as to who, as between Mr. and Mrs. Weldon, may own the sum of $900.00. Each petition asks for its return; and the appellee is in no position

to question the right of one or the other of appellants to the money—although both appellants allege that the money belongs to Mrs. Weldon; and each petition was for its return to her.

II

THE COMPLAINT WAS INSUFFICIENT; THEREFORE THE WARRANT WAS INVALID; THEREFORE THE ARREST WAS ILLEGAL.

In addition to the cases, cited in appellants' opening brief, they desire to cite the additional authority—

U.S. vs. *Lynch*, 11 F. 2d 298,

where on a charge of concealment of assets, namely: "certain goods, wares, merchandise, moneys, funds, credits and other things of value, a further and more particular description thereof being" unknown—and without any further description or allegation of value, it was held that the indictment was insufficient.

In *Kanner* vs. *U.S.*, 21 F. 2d 285,

relied on by appellee, it was alleged that the property consisted of *moneys* and other properties of divers amounts, the exact and more particular description of which was to the grand jurors unknown.

In *Greenbaum* vs. *U.S.*, 287 F. 474,

referred to in *Kanner vs. U.S.*, supra, the indictment charged concealment of "a large portion of the prop-

erty belonging to the bankrupt estate, said property consisting of money and merchandise to the value of $30,000.00. In that case a bill of particulars was furnished. Indictment held sufficient.

In *Keslisky* vs. *U.S.*, 12 F. 2d 767,

the indictment charged concealment from the trustee of "certain goods, wares, moneys, merchandise, shoes and personal property belonging to said bankrupt estate, a more particular description of which is to your Grand Jurors otherwise unknown." A letter which was considered as a bill of particulars showed that the moneys were proceeds of goods sold from the accused's stock, and that the shoes and other goods mentioned were removed from the store.

Appellee refers to the forms for indictments appearing in Appendix A to Federal Criminal Rules Annotated, in an effort to support the sfficiency of the complaint.

Appellants therefore call attention to Form 9 which at least sets forth the amount of the money in a charge for obtaining money by impersonation of a Federal officer; and Form 10, an indictment for presenting fraudulent claims against the United States, describes the property as 100,000 lineal feet of No. 1 white pine lumber; and Form 4 for sabotage describes the making of defective *shells;* and Form 2 for murder describes the *name* of the person killed.

In no case cited by appellee has the Court sustained so barren a charge as appears in the complaint in this

case where the only statement was that the accused concealed *"property"* belonging to the said bankrupt estate.

For aught any one knows the *property* Weldon was charged with concealing was anything from a pin to a locomotive. Appellants therefore confidently contend that the complaint in this case is insufficient to support the warrant of arrest; that the warrant of arrest is invalid for that reason; and also that the arrest was as if without a warrant. (*U.S.* vs. *Haberkorn*, 149 F. 2d 720)

It is to be noted that appellee makes no effort whatever to distinguish the case of *U.S. vs. Haberkorn*, supra, nor to show that the rule of law there announced as to the limited authority of agents of the F.B.I. to make arrests without a warrant is inapplicable here.

Weldon was not engaged in the commission of any offense, and he was not likely to escape.

III

THE SEARCH WAS NOT LAWFULLY INCIDENTAL TO AN ARREST. IT WAS UNLIMITED AND EXPLORATORY, IN SEARCH OF EVIDENCE, AND IT WAS UNREASONABLE AND ILLEGAL.

Under this heading appellee cites recent cases, apparently in an effort to contend that the old landmarks on this subject such as

Boyd vs. *U.S.*, 116 U.S. 616; 6 S.Ct. 524,
Weeks vs. *U.S.*, 232 U.S. 383; 34 S.Ct. 341,

Gouled vs. *U.S.*, 255 U.S. 298; 41 S.Ct. 261,

Go-Bart Importing Co. vs. *U.S.*, 282 U.S. 344; 51 S.Ct. 153,

U.S. vs. *Lefkowitz*, 285 U.S. 452; 52 S.Ct. 420,

no longer express the law applicable to the subject of what constitutes a *reasonable* search and seizure under the Fourth Amendment.

We do not believe that any one of the late cases cited by appellee has so far departed from the long-established principles laid down by the famous decisions of Justices Bradley, Day, Clarke, and Butler as to be controlling here.

The break from previous holding, if break there be, can be fairly said to turn principally on what constitutes an *unreasonable* search.

In *Harris* vs. *U.S.*, 331 U. S. 145; 67 S. Ct., 1098,

the officers, holding warrants of arrest, searched for two forged checks, the subject matter of the complaints supporting the warrants. In the course of the search they found a large number of draft cards, the property of the United States—which draft cards were properly subject to seizure as *instrumentalities of crime*—as distinguished from property which would have been merely evidentiary of crime.

In *Matthews* vs. *Correa*, 135 F. 2d 534,

the officers seized fruits of a crime committed *in their presence* while they were engaged in making a lawful search. It was averred and apparently held that the books seized contained evidence of receipts and disbursements—valuable evidence connected with the crime charged.

In *U.S.* vs. *Rabinowitz*, 339 U.S. 561; 70 S.Ct. 430,

while making a search under a warrant of arrest for four forged postage stamps, the subject matter of a complaint, the officers seized 573 forged stamps—the mere *possession* of which *constituted a felony* committed in their very presence.

We think all three of said cases are distinguishable from this Weldon case.

Judge Yankwich does say in

In *U.S.* vs. *Bell*, 48. F. Supp. 986,

that later cases have whittled away the protection given by the Fourth Amendment under the older cases, and it must be acknowledged, as shown by the strong dissenting opinions in those cases, that there is a basis for Judge Yankwich's remark.

However, we are on solid ground here—notwithstanding what has been recently decided—for the following reasons:

1. The complaint was defective and insufficient to support or provide probable cause for the warrant of arrest; and the arrest was as if without a warrant.

2. The agents of the F.B.I. had no authority whatever under the facts in this case to arrest without a warrant. Such agents have only limited authority to make arrests.

3. There was no search warrant.

4. The search as made was manifestly unlimited and exploratory, in search of whatever could be found. The officers had no idea whatever what they were looking for. The arrest was merely an excuse for the search. The search was the primary thing. All facts and circumstances, including the vague and uncertain complaint, show this to be true.

5. The property seized was not contraband; and it is not shown to have been the proceeds of or in any way connected with any concealment of property of the bankrupt estate.

The source of the $900.000 was duly explained. The cigarette case was not shown to belong to the bankrupt estate. The bill of sale for the Crosley car belonging to Mrs. Prince was not shown to be in any way related to the charge; and it was in the lawful possession of Mrs. Weldon. The index card is not shown to contain any evidence whatever; and it belongs to Weldon.

Apellants respectfully contend, therefore, that the orders should be reversed and the property returned—the $900.000, the cigarette case, and the bill of sale for the Crosley car to Dorothy Weldon, and the index card to Seth J. A. Weldon; and all such property should be suppressed as evidence.

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